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Supreme Court of the United States

OCTOBER TERM, 1945

NO. 1210.

PAUL GINSBURG, Petitioner,

v.

CHARLES H. SACHS, WILLIAM C. McELDOWNEY
and MAX PERLMAN.

BRIEF FOR RESPONDENTS, CHARLES H. SACHS,
WILLIAM C. McELDOWNEY AND MAX PERLMAN,
OPPOSING PETITION FOR CERTIORARI.

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OPINIONS BELOW.

While the petitioner mentions the opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, reported in 91 Pittsburgh Legal Journal 217, the petitioner states that this opinion "did not deal with the question presented herein as the question was not raised in that court".

However, as the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, upon which the petitioner relies, requires, as a condition to the opening of a judgment, that "the defendant has a meritorious or legal defense", and as the petitioner attempts in his petition to show that petitioner's client has a meritorious and legal de-

fense in the very suit in which the opinion just referred to was filed, that opinion is printed as an Appendix to this Brief, so that this court may see for itself how utterly lacking in merit the case of petitioner and his client really is.

JURISDICTION OF THIS COURT.

It is respectfully submitted that this court is now without jurisdiction to grant a writ of certiorari in this case, because the petition for certiorari was not filed until May 7, 1946, whereas the judgment of non pros which is complained of by the petitioner was entered by the Supreme Court of Pennsylvania on September 28, 1943 (R. 1), so that the limitation of three months prescribed by 28 USCA 350 had expired long before the petition for certiorari was filed in this court. (Although the petition for certiorari is professedly directed against the orders refusing the petition to vacate the non pros and the petition for reconsideration, the actual objective is obviously the judgment of non pros).

QUESTIONS PRESENTED.

May an attorney-at-law, who was not a party to a suit in the court of original jurisdiction, but merely appeared as attorney for the defendant therein, and who did not appeal to the highest court of the State from an injunction enjoining the defendant, "his counsellors, attorneys and agents", now claim in his own right (and not in the right of his civilian client) the benefit of the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, because this attorney was a member of the United States Army when the judgment of non pros was entered, al-

though he appeared in person in the highest court of the State in opposition to the entry of such judgment?

Where a judgment of non pros of an appeal was entered by the Supreme Court of Pennsylvania on September 28, 1943, and a petition for a writ of certiorari to review that judgment was not filed in the Supreme Court of the United States until May 7, 1946, is not that petition barred by the three months' limitation of 28 USCA 350, even though a petition to vacate the non pros was filed in the Supreme Court of Pennsylvania on October 2, 1944, and refused the same day, and a petition to reconsider the former petition and to vacate the non pros was filed on March 26, 1946, and refused on March 26, 1946?

COUNTER-STATEMENT OF THE CASE.

On May 25, 1943, the Court of Common Pleas of Allegheny County, Pennsylvania, entered an injunction (R. 7) in the suit of Charles H. Sachs, William C. McEl-downey and Max Perlman, as plaintiffs, versus Philip Ginsburg, as defendant, enjoining the defendant, his counsellors, attorneys and agents, from instituting further criminal proceedings against the plaintiffs, charging them with conspiracy or criminal libel in connection with certain matters embraced in various informations previously made by the defendant, all of which had been disposed of adversely to the prosecutor in the criminal courts of the county. The subject matter of the litigation which resulted in this injunction, and the history of the prior criminal proceedings, will be found in the opinion of the Court of Common Pleas which is printed as an Appendix to this brief.

The present petitioner, Paul Ginsburg, who is an attorney-at-law, was not a party to the injunction suit.

He was not named as a plaintiff or defendant and his entire connection with the case was that he appeared as attorney for his father, the defendant, Philip Ginsburg.

On May 28, 1943, the defendant, Philip Ginsburg, entered an appeal in the Supreme Court of Pennsylvania from the injunction decree (R. 1). The appeal was filed solely in behalf of the defendant, Philip Ginsburg (R. 2). The present petitioner, Paul Ginsburg, was not a party to this appeal. He merely appeared as attorney for his father, the appellant (R. 2).

On September 28, 1943, the Supreme Court of Pennsylvania entered a judgment of non pros on the appeal of Philip Ginsburg, because the appellant had not filed assignments of error and briefs as required by Rule 60 of that court (R. 3).

This order was entered on the day following the personal appearance of the petitioner, as attorney for his father, in the Supreme Court of Pennsylvania, in opposition to the entry of such order (Petition, page 5). At that time, the petitioner was a member of the United States Army, but his father, Philip Ginsburg, was then, and at all other times involved in this litigation, a civilian residing in Pittsburgh, Pennsylvania.

Nothing whatever was done in this matter between September 28, 1943, when the non pros was entered, and October 2, 1944, more than a year later, when the petitioner filed a petition with the Supreme Court of Pennsylvania, asking that court to vacate the order of non pros and reinstate the appeal of Philip Ginsburg (R. 3). This petition was refused by the Supreme Court of Pennsylvania on October 2, 1944 (R. 5).

Nothing further was done between October 2, 1944, and December 24, 1945, more than another year later,

when the appellant, Philip Ginsburg (not the petitioner) filed a petition in the Supreme Court of Pennsylvania asking that the order of non pros entered on September 28, 1943, be vacated (R. 5). That petition was refused on January 7, 1946 (R. 7).

On March 23, 1946, the petitioner, Paul Ginsburg, claiming, for the first time in this litigation, that the injunction decree was effective as a decree against him because he was attorney for the defendant in that suit, filed a petition in his own name in the Supreme Court of Pennsylvania (R. 7), asking that court to reconsider the petition filed on October 2, 1944, and to vacate the order of non pros entered on his father's appeal, on the ground that, as attorney for the appellant in that appeal, the petitioner was entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940. That petition was refused by the Supreme Court of Pennsylvania on March 26, 1946 (R. 10).

On May 7, 1946, some two years and seven months after the appeal of Philip Ginsburg, the petitioner's father, was non prossed by the Supreme Court of Pennsylvania, the petitioner, Paul Ginsburg, who was not the appellant in the Supreme Court of Pennsylvania, filed a petition in his own name in this court for a writ of certiorari to review the judgment of non pros against his father.

Petitioner's father, Philip Ginsburg, who was the sole defendant in the Court of Common Pleas of Allegheny County and the sole appellant in the Supreme Court of Pennsylvania, is not a party to the present petition for a writ of certiorari.

We have not attempted in this Counter-statement of the Case to discuss the many statements made in the petitioner's Statement of the Case and elsewhere in his petition which have no basis whatever in the record. We should, however, like to say that the statement of counsel for the petitioner, on page 6 of the petition, that "opposing counsel had been delaying the cause for lucre and malice and had been taking unfair advantage of petitioner's being in the military service", is not only not supported by anything that appears in the record of this case, but is also without any foundation in fact. Like petitioner's reference, on page 7 of the petition, to "criminal defendants", it is of a pattern with the reckless and irresponsible statements which caused the Supreme Court of Pennsylvania to enter three orders of expungement of scandalous matters appearing in briefs filed by the petitioner in a related mandamus case referred to on page 4 of the Record herein.

ARGUMENT.**I. The petitioner was not a party to the appeal which was non prossed by the Supreme Court of Pennsylvania.**

The appeal to the Supreme Court of Pennsylvania which was non prossed by that court on September 28, 1943, (R. 3), was not the appeal of the present petitioner, Paul Ginsburg, but the appeal of his father, Philip Ginsburg, who was the sole defendant in the suit in which the injunction decree was entered and the sole appellant in the Supreme Court of Pennsylvania (R. 2).

Petitioner's sole connection with that case was as attorney for the defendant-appellant. Petitioner could not have taken an appeal from the decision of the court below granting the injunction, even if he had wanted to do so, and, whether he wanted to or not, the fact remains that he did not take an appeal. He has since,—a year later,—sought to make himself a party to the record by filing a petition asking for the vacation of the order of non pros (R. 5) and,—more than another year later,—a petition asking reconsideration of his petition to vacate the order of non pros (R. 10).

Petitioner cannot inject himself into this case by claiming that a decree which could only affect him in his representative capacity is a decree against him in his individual capacity, which gives him the right, at this late date, to pick up this stale litigation which his father, the actual appellant in the Supreme Court of Pennsylvania, has long since failed to pursue.

II. The Soldiers' and Sailors' Civil Relief Act has no application to this case because the judgment of non pros in the Supreme Court of Pennsylvania was not entered against an appellant in the military service.

There is no pretense by the petitioner in this case that his father, Philip Ginsburg, who was the sole defendant in the Court of Common Pleas of Allegheny County and the sole appellant in the Supreme Court of Pennsylvania (R. 2), was ever in the military service. Actually, he is a civilian and has been so at all times involved in this litigation.

The Soldiers' and Sailors' Civil Relief Act is a statute enacted for the protection of defendants in the military service. It is an act for the relief of "Soldiers and Sailors", and not for the relief of civilian defendants.

Nor is a defendant entitled to the protection of the statute merely because he happens to have an attorney who, during the course of the litigation, is drafted into the military service. Obviously, the statute offers no relief in a situation of this kind, because there were still many lawyers (at least one thousand in Allegheny County) not in the military service who were available to represent civilian defendants.

If it were otherwise, a civilian defendant could deliberately delay the prosecution of a case by refusing, as the defendant in this case has done, to retain other counsel. That the defendant elected not to retain other counsel cannot result in giving the defendant (who would obviously receive the benefit of an order vacating the non pros) the benefits of the Soldiers' and Sailors' Civil Relief Act.

III. The Soldiers' and Sailors' Civil Relief Act has no application to this case because no default judgment was entered.

The Soldiers' and Sailors' Civil Relief Act could be of no avail to the petitioner, because the petitioner actually appeared in person in the Supreme Court of Pennsylvania in opposition to the entry of judgment of non pros.

Section 200(1) of the Soldiers' and Sailors' Civil Relief Act, upon which the petitioner relies in this case, relates to any action or proceeding, "if there shall be a default of any appearance by the defendant". Far from there having been a default of appearance by the defendant-appellant in that case, the petitioner states, on page 5 of his petition, that on September 27, 1943, the day before the non pros was entered, he appeared before the Supreme Court of Pennsylvania and made application to continue argument on his father's appeal. Instead of continuing the argument, the court entered a judgment of non pros for failure to comply with its rules.

This was not a judgment in "default of any appearance by the defendant".

IV. Neither the petitioner nor his father has a meritorious or legal defense to the injunction suit.

The Soldiers' and Sailors' Civil Relief Act offers its protection, to those in the armed services, only if it is made to appear "that the defendant has a meritorious or legal defense", Section 200(4). Even if the petitioner were a proper party in this court, (which is not the case), he has failed to establish the existence of a "meritorious or legal defense". His attempt to brush aside the opinion of the Court of Common Pleas, on the ground that "it did not deal with the question presented herein" (Petition, page 1) is evidence of his refusal to face the issue squarely. Actually, that opinion is the complete answer to his claim that he has a defense on the merits.

The injunction from which the appeal to the Supreme Court of Pennsylvania was taken was not an injunction prohibiting the defendant (father of the petitioner) from filing a criminal information in a matter which had never previously been before the criminal courts of the county. On the contrary, it was an injunction to prevent vexatious and unwarranted litigation in the form of further criminal prosecutions arising out of matters which had been raised in prior prosecutions in the criminal courts and which had been dismissed consistently by those courts.

The opinion of President Judge Rowand, in the Court of Common Pleas of Allegheny County, which appears as an Appendix to this brief, recites the various criminal proceedings which had been instituted by the defendant against the respondents herein, and the

disposition made of those cases, before the injunction suit was filed. As the opinion indicates, it was only after the defendant had been rebuffed repeatedly in the criminal courts and had threatened nevertheless to harass the respondents with further criminal prosecutions for alleged conspiracy and criminal libel, based upon evidence which the courts had held did not support these charges, that the court entered an injunction against the defendant to restrain him from filing further informations on the same charges.

The Pennsylvania cases cited by petitioner do not support his present contention. In none of them had the courts been asked to restrain threatened criminal prosecution after the criminal courts had passed upon similar prosecutions by the same prosecutor against the same defendants. On the contrary, in *Meadville Park Theatre Corp. v. Mook*, 337 Pa. 21, 10A. 2d 437, which is so much relied upon by the petitioner, the Supreme Court of Pennsylvania said, at page 28:—

“We regard it as well settled * * * that, except in cases where a multiplicity of suits would constitute reason for an exception * * * a court of equity will not intervene, but will leave the plaintiff to have his rights determined in the criminal proceeding.”

The case at bar presents an outstanding example of “a multiplicity of suits” and of vexatious litigation persisted in after the criminal courts had repeatedly disposed of the same subject matter. Obviously, the case fails to present that “meritorious or legal defense” which the Soldiers’ and Sailors’ Civil Relief Act demands of those who seek its benefits.

V. The applicability of the Soldiers' and Sailors' Civil Relief Act was raised too late.

The judgment of non pros in this case was entered by the Supreme Court of Pennsylvania on September 28, 1943 (R. 3). Although the petitioner was then already in the United States Army and appeared in court in opposition to the non pros (Petition, page 5), and although he filed a petition to vacate the order of non pros on October 2, 1944, (R. 3) and a second petition to the same effect on December 24, 1945, (R. 5), he did not raise any question as to the applicability of the Soldiers' and Sailors' Civil Relief Act,—the only Federal question involved in the petition,—until March 23, 1946, when he filed another one of his repeated petitions. Obviously, this question, raised for the first time two and one-half years after the original non pros was entered, came much too late.

“Federal questions first presented to the highest state court on a petition for rehearing come too late for consideration by the Supreme Court of the United States, unless the state court exerted its jurisdiction in such a way that the case could have been brought to the Supreme Court had the questions been raised prior to the original disposition.”

Radio Station WOW v. Johnson, 326 U. S. 120, 89 L. Ed. 1397 (1945).

Actually, there is no Federal question in this case, because as we have shown above, the Soldiers' and Sailors' Civil Relief Act has no applicability here. The judgment of non pros was a judgment entered by a State court in conformity with its own rules of practice. But even if there were a Federal question, it was raised much too late to help the petitioner.

VI. The petition for writ of certiorari was filed too late.

The petition for writ of certiorari in this case was filed on May 7, 1946, some two years and seven months after the Supreme Court of Pennsylvania, on September 28, 1943, entered the judgment of non pros which forms the real objective against which the present petition is directed. (Although the petition nominally asks for a review of the orders refusing the petition to vacate the non pros and the petition for reconsideration, the real object of attack is obviously the judgment of non pros).

Nothing further was done in the case until October 2, 1944, when a petition to vacate the non pros was filed and refused. Again, nothing further was done until December 24, 1945, when another petition was filed to vacate the order of non pros. This petition was refused on January 7, 1946. On March 23, 1946, the petitioner filed a petition asking the court to reconsider the petition filed on December 24, 1945, and to vacate the non pros. This petition was refused on March 26, 1946.

The time for making application for writs of certiorari is fixed by 28 USCA 350, which provides that:

"No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *".

This statutory limitation of three months expired in this case on December 28, 1943, three months after the Supreme Court of Pennsylvania entered its judgment of non pros.

It is of no avail to the petitioner that on March 23, 1946, less than three months before the petition for cer-

tiorari in this case was filed, petitioner filed a petition for reconsideration of the petition filed on December 24, 1945, and for the vacation of the non pros. New life cannot be breathed into these dead bones by this belated action of the petitioner.

"The thirty days' limitation prescribed by general order in bankruptcy No. 36 for taking an appeal from a final order of a circuit court of appeals in a bankruptcy case cannot be extended by filing a petition for rehearing after the thirty days have expired, although there may be but one term of that court, and by its rules of practice, petitions for rehearing may be presented at any time during the term."

Conboy, Trustee v. First National Bank of Jersey City, 203 U. S. 142, 51 L. Ed. 128 (1906).

Conclusion.

It is respectfully submitted that the petition for writ of certiorari in this case is entirely without merit or foundation. It is obvious that the petitioner in his individual capacity is a total stranger to these proceedings and that the petition itself was filed long after the expiration of the period during which a petition for certiorari might properly be filed with this court.

Actually, this case involves nothing more than the interpretation and enforcement by the Supreme Court of Pennsylvania of its own rules of procedure, evidenced by a judgment entered on September 28, 1943, non prosing an appeal to which the petitioner was not a party.

Respectfully submitted,

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Counsel for Respondents.

